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Supreme Court of the United States

No. 227—October Term, 1962

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

RESPONDENT'S BRIEF

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BATAVIA TIMES, LAW PRINTERS,
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RESPONDENT'S BRIEF

The case involves the trial of a doctor of medicine before an administrative tribunal on charges of unprofessional conduct. The charges were deemed established by the unanimous decision of both the Appellate Division (13 App. Div. 2d 591), and the Court of Appeals (11 N. Y. 2d 173, 182 N. E. 2d 264), and the revocation of petitioner's license to practice medicine stands affirmed.

Procedure and Determinations Under N. Y. Education Law

Education Law, § 6514, subd. 2(a) provides that a doctor may be deprived of his license if, after a hearing, he is found "guilty of fraud or deceit in the practice of medicine". The trial is had before the Medical Grievance Committee of the Regents (*id.*, § 6515) and is reviewable by the Regents Committee on Discipline (*id.*, § 211). The deci-

sions of each of these Committees were unanimous. The former Committee consists of ten doctors whose vote, to bring about the revocation of a license must be unanimous. In the instant case there was one vacancy caused by death (App., p. 14a), but the New York Court of Appeals stated that when 9 out of 9 of the Committee who heard the case all voted for revocation the requirements of unanimity were met (App., p. 6a).

The Medical Grievance Committee handed in its Report (App., p. 10a) to the Regents, whose Committee on Discipline in turn reported to the Regents its agreement with the determination of the Committee on Grievances, as the Committee on Discipline was required to do under Education Law, § 211. Whereupon, the Regents adopted its Committee's Report (App., p. 9a).

The Petitioner's Offense

The petitioner was charged with fraud and deceit in the practice of medicine under Education Law § 6514, subd. 2(a) in that he submitted to an attorney (since disbarred: see *Matter of Silver* v. *Miller*, 13 App. Div. 2d 974 [2nd Dept., 1961]) false medical reports and false bills to assist the attorney in securing more favorable settlements in actions for personal injuries (R., 8). He was also charged with unprofessional conduct (R., 11).

Holding of Courts Below

The charges were held to have been proved by both Courts below. As to the former charge, the Court of Appeals said (App., p. 3a):

> "Nothing in the statute limits discipline for fraudulent diagnoses to cases where the fraud is perpetrated directly on the patient. Indeed, insurance companies

are frequently the ultimate payers of medical bills in personal injury cases, and in this respect are just as much entitled to true medical reports and bills as are the patients. Appellant's fraudulent scheme, of course, was dependent upon misuse of his medical license, and the submission of false reports and bills to interested persons was an integral part of his medical practice. The preparation of medical reports for various purposes has always been regarded as a necessary part of medical practice, and it makes no difference whether false reports are submitted directly to the patient, attorney, or the insurance company on behalf of the patient. The statute authorizes discipline in any event.

Submissions of false reports of various types to interested persons or institutions other than the patient himself have been found to constitute 'fraud or deceit in the practice of medicine' in numerous cases." (citing cases).

As to the latter charge, the Court said (App., p. 5a):

"Appellant's participation was *malum in se* and undoubtedly amounted to 'unprofessional conduct' under the standards commonly accepted by physicians in this State (*Matter of Cherry* v. *Board of Regents*, 289 N. Y. 148, 158-161; *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101).

Moreover, the acts were so obviously wrong and violative of the standard of ethics expected of a physician that they constituted 'unprofessional conduct' even in the absence of regulations defining the term (*Matter of Bell* v. *Board of Regents*, *supra*)."

The Trial

The Record on Review filed in the Court of Appeals of New York sets forth the minutes in full. The appearances are noted at R. 37, and the testimony of the witnesses for the Regents is set forth at R. 54-129. Ample opportunities to cross examine were afforded to petitioner's coun-

sel, Mr. Dawson. See *e.g.*, R. 64, 75, 81, 84-86, 94-101, 106-107. Doctor Wassermann took the stand in his own behalf at R. 134-155. He was cross-examined at R. 155-176.

While certain patients of the Doctor were not called (R. 129-130), yet the statute (Education Law, § 6515, subd. 5) provides:

> "The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same."

We submit that the allegations in the petition filed in this Court to the effect that the trial was not fair are baseless.

The Attack on the Statutes

(1)

The assertion (Pet., p. 29) that a 1953 statute (N. Y. L. 1953, ch. 682) was applied retroactively against petitioner and thus violated the constitutional provisions against *ex post facto* laws is absurd for two reasons: (1) we are dealing with a civil, not a criminal statute; and (2) some of the petitioner's acts continued well into 1956, as the Court below found (App., p. 5a).

(2)

The petitioner assails the impartiality of the administrative tribunal before which his trial on charges took place. This raises no federal question.

It has long been recognized that when the conformity of the conduct of a member of a learned profession with the traditional standards of that profession is under challenge, it is proper to have the man tried before a tribunal

consisting of members of that profession. This procedure received the approval of this Court in *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954), which involved the same procedural provisions of the Education Law as are involved in the instant case. This Court held (pp. 452-453) that the provisions met the requirements of due process.

It has generally been recognized that members of a particular profession may properly be made the judges of the qualifications of an applicant for admission. *People* v. *Griswold*, 213 N. Y. 92 (1914); *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166 (1904); *Spencer* v. *Hunt*, 109 Fla. 248, 147 So. 282 (1933). And see JAFFE, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 249 (1937); Case-note: *Delegation of Governmental Power to Private Groups*, 32 Col. L. Rev. 80 (Jan., 1932). And when the right of a member of one of the learned professions—whether the field be law, or medicine, or theology—to continue to *remain* in the profession is under challenge by reason of some matter of personal conduct, the member by immemorial custom is tried before a tribunal consisting of members of that profession.

We submit that it is not necessary to spell out what constitutes unprofessional conduct; and that in any event the Court of Appeals was fully warranted in using the language quoted above from App., p. 5a.

The term "unprofessional conduct" is not to be deemed void for vagueness simply because the term is not defined in detail or with precision. We submit that it is a term of which a man who has (as has the petitioner) been a doctor ever since 1937 may be assumed to possess an adequate comprehension. *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101, 110 (1945). Since, in areas involving ad-

ministrative detail and complexity, there is need for "practicality and flexibility in laying down standards" (*Matter of Old Republic Ins. Co. v. Wikler*, 9 N. Y. 2d 524, 532-533 [1961]), we submit that "unprofessional conduct" need not be defined in detail or by example. This Court long ago expressed similar views in a disbarment case. *Ex parte Secombe*, 19 How. 9, 14 (1856).

The Petition For Certiorari Should Be Denied

July 17, 1962.

Respectfully submitted,

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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INDEX

Cases Cited

	PAGE
Barsky v. Board of Regents, 347 U. S. 442, 74 S. Ct. 650	2, 3
Cherry v. Board of Regents, 289 N. Y. 148 at page 154	2
Consolidated Edison v. N.L.R.B., 305 U. S. 197, 229-230, 59 S. Ct. 206, 217	1
Cosmopolitan v. Feuchtwanger, 226 N. Y. S. 2d 584, 592	1
Cummings v. The State of Missouri, 71 U. S. 277	3
Ex parte Secombe, 19 How. 914	2
Gardner v. Ginther, 250 N. Y. S. 176, 182, 232 A. D. 296 aff'd 257 N. Y. 578, per cur.	2, 3
Hilfer v. Board of Regents, 283 N. Y. 304, 307-309	2, 3
In re Donegan, 282 N. Y. 285	3
Lloyd, etc. v. Elting, 287 U. S. 329, 339-340, 53 S. Ct. 167, 172	3
Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 341, 342	3
Stromberg v. California, 282 U. S. 359, 368, 51 S. Ct. 532, 535	3
Sung v. McGrath, 339 U. S. 33, 50, 70 S. Ct. 445, 454	2
U. S. v. Zimmerman, 94 F. S. 22, 25	3
Williams v. N. Carolina, 317 U. S. 287, 292, 63 S. Ct. 207, 210	3